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**Beyond legal categories of Indigeneity and minority-ness:**
**The case of Roma and falling in-between**

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Abstract

The categories emanating from international human rights law defining the belonging of peoples to different types of minorities invites for a re-assessment. These different minority categories such as indigenous peoples, national (historical) minorities and migrants tend to fix people to different types or levels of specific protection. The justifications for different treatment are, however, not born in a vacuum or value-free, and they rarely fit seamlessly with real life cases of needs of minorities. Thus, in this article I shall discuss the legitimacy and consequences of the current typology, which divides minorities into different categories. This categorization has direct consequences for the rights people can claim vis-à-vis their governments and the international community. To illustrate the key concerns with the contemporary categorization of minorities, this article presents the case of Roma and their current struggles to fit their claims and needs into the existing minority rights framework.*

## Introduction

"Don't rock the boat", said the High Commissioner on National Minorities† of the Organization for Security and Co-operation in Europe (OSCE), when the meaningfulness of the legal categorization of different types of minorities was discussed. Don't rock the boat. The High Commissioner Astrid Thors, having a long experience in minority politics, was completely aware of the fact that these times in the 2010s are, once again, exceptionally unfriendly towards diversity, with rising political support

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† Astrid Thors was the High Commssioner on National minorities of the OSCE between 2013-2016. See Organization for Security and Co-operation in Europe (n.d.) on the tasks of the OSCE High Commissioner on National Minorities.

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for far-right parties across Europe (Vieten & Poynting 2016). Kenneth Roth (2017, p. 1), the Executive Director of Human Rights Watch, calls the present situation a "global attack on human rights values". In times of uncertainty, change may lead to the weakening of previously established commitments toward human rights. This was the point by the High Commissioner Thors when she stated that it is better to stick to the legal instruments already in place for minority protection. Opening up a discussion on the overlaps and faults in the categorization of people into majorities, immigrants, second generation immigrants, national minorities or indigenous peoples, as this article will attempt to do, comes with certain risks.

There is plenty of evidence which suggests that minority-specific rights and multicultural policies have so far done more good than harm; inter-group equality and peace has indeed in many contexts increased (Kymlicka 2001, p. 36-37). Recognition and categorization today decides, which minority groups are welcomed into the public sphere, whose culture and language gains special protection by the states, and whose members receive positive discrimination in order to gain equal possibilities in society (Toivanen 2004). Thus, at the same time, since a certain legal label grants a person distinctly different access to rights and forms severely distinct grounds for asking for protection or support (see Kymlicka 2007, p. 78-79), a discussion is indeed justified. In academia, this topic deserves serious attention, without scholars giving in to emotional fears of rocking the boat. We need a fearless and honest deliberation on the topic of minority categorization in order to receive the aims which are core to the doctrine of human rights: equality, the right to culture, liberty of self-identification and freedom from discrimination.

The aim of this article is to spotlight a few of the central issues with the differentiated minority statuses that constitute the core of minority protection today. The principal issues will be discussed in relation to the specific case of Roma peoples. The people(s) today included under the headline of "Roma" are in a minority position in a majority of the European countries and in urgent need to get their human rights fulfilled (Sigona & Vermeersch 2012). At the same time, they have in many ways fallen in-between the legal categories that ensure contemporary minority protection (Agarin & Cordell 2016). This article shows, that in many senses their case enlightens the incapability of the current minority typology to meet the current needs of all minority members in Europe on the one hand, and, on the other hand, enlightens the tendency of the current system to place external restraints on the freedom of minority members to live out their cultural life and identity without requirements to live up to certain forms of "minority-ness".

**Transformation of minority protection in the 20th century – arriving at separate minority rights categories**

The contemporary minority right categories originate from international historical and political contexts and they have become glocalized in various manners. In neither the global nor the local sphere, are the categories in any way typologies which arise from "natural" cultural divisions of human beings, nor are they in any way value-free (see e.g. Benhabib 2002; Bhambra 2006). Complicated political and historical twists led to the current situation, where ethnic minorities in Europe are primarily granted minority rights based on recognition through three different categories; national minorities, indigenous peoples and immigrant/ethnic groups. As Kymlicka (2007, p. 78-79) points out, "[I]t is quite surprising how little interaction or spillover there is between these different policy tracks". Both the legal and the political spheres, and as I argue, even the academic sphere, tend to approach the groups designated to these categories separately. In few, if any, contexts, have they all become united in the struggle for increased accommodation of cultural diversity and equal opportunities (Ibid.). This has consequently led to a situation where granting minority rights comes with the prerequisite to define who qualifies as a "national minority", an "indigenous people", or an "immigrant ethnic minority"; a question of identity politics through questions recognition and categorization (Cowan, Dembour & Wilson 2001).

Eide (2014) argues that there are three basic values and aims that have been guiding minority protection in international law up until today (at times with diverging emphasis on each). The first value emanates from the norms of human rights, and contains that everyone should be able to enjoy all human rights fully, regardless of ethnic or cultural belonging. This calls for positive and targeted measure to be added to the human rights framework and is why the contemporary minority categories ensuring special differentiated rights have taken form. The second aim is to protect and facilitate cultural diversity and pluralism. Eide (2014) argues that the combination of these two, have led to the need to ensure everyone's right to express and live out their culture and identity without the fear of discrimination. The third aim is to ensure peace and security for all members of society from both regional and national perspectives. I argue, that from the perspective of these core aims and values towards which the human rights frameworks strive, much is still to be done and corrected in relation to the current system of categorization, which threatens the true inclusion of all people in a minority situation today.

This article starts with a summary of the upsurge of the different minority categories; national minorities, indigenous peoples and immigrant groups. After this follows a short critique of the contemporary both political and scholarly neglect of recognizing that these categories are not given nor are they always justifiable when looking at real life cases and lives of minority members in Europe today. After this the case of Roma peoples will be introduced and used to highlight some of the core issues that arise when putting the current typology under scrutiny. I conclude the article by some suggestions for what could be done to overcome the issues at hand.

**National minorities – A European Innovation?**

During the 20th century, we have seen an enormous transformation how we comprehend minority protection (see Kymlicka 2007, Ch. 1., Ch. 2.). In 19th century Europe, nationalist ideologies sprung out with force and at the turn of the 20th century, many nation states in Europe governed their national territory based on the idea of one nation, one culture, one language and one people (see Offe 1996). Consequently, having people on the national territory who "belong" to another nation became a "problem". Forcefully assimilative policies towards minorities were common during the first half of the 20th century. After the First World War, the League of Nations tried to come up with solutions for how to protect the groups of people who were left without a state of their own and in many ways experienced discrimination and violent assimilation and were in conflict with the majority groups (Gálantai 1992). It has been often stated that the League Nations failed to accomplish minority protection. The mass-murders of Jews and Roma during the Second World War made it obvious, that the nation states of the time were not capable of ensuring even the most basic security for minority members living on their territories (Saul 2016).

After the Second World War, the United Nations (UN) established its Human Rights Framework with the objective to protect all human beings by universal rights. The idea was, that it was no longer only up to single states to choose how to treat their citizens nor non-citizens staying on their territory (Gibney 2008). It was thought, that universal rights could respond to the grievances of all individuals, and eradicate discrimination based on ethnic belonging and division along ethnic lines. However, specific issues faced by ethnic minorities were palmed to a separate body of experts inside the UN; the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This body, however, was argued to achieve little leverage on the actual implementation of minority

rights (Humphrey 1968). Humphrey (1968) argues, that the establishment of the Sub-Commission in fact let the UN dodge responsibility for taking action on issues of minority protection.

Later during the post-war era however, movements for granting minorities positive rights to maintain their culture and their identity started to take form. The closest the United Nations human rights protection came to ensuring protection for minority cultures and identities, was through Article 27 of the International Covenant on Civil and Political Rights of 1976. The Article states that

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. (International Covenant on Civil and Political Rights 1966)

During the first decades of its implementation, Article 27 was, however, primarily interpreted as ensuring only generic and negative rights, rights of non-intervention. Until the Cold War, it did not ensure the right to minority specific, targeted rights (see Jackson Preece 2006).

As for the human rights framework in Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) did not then and does not today include any article on minority protection. Also, the case law on minority rights has been weak and contradictory in the European Court of Human Rights (Greer 2006, p. 58; Medda-Windischer 2003). The Federation of European Nationalities, which was founded in 1949 by activists that survived the Second World War, was vigorously pressing for a separate minority rights protocol to be added to the European Convention on Human Rights, without success.

Europe still had to witness more ethnic cleansing and violence before the Council of Europe and the member states were ready to admit that targeted minority rights were needed as supplement to existing human rights frameworks. During and after the Cold War, minority groups started to pose increasing claims on their homelands, which in many Eastern European countries led to severe conflicts (Kymlicka 2007, p. 202). These conflicts called for a solution, and in 1994 the European Framework Convention for the Protection of National Minorities (1994) (FCNM) was established by the Council of Europe (Kymlicka 2007, p. 200-203), marking a new era in minority protection by the appliance of distinct minority statuses. In 1992, also the European Charter for Regional or Minority Languages was adopted. Around the same times, also the UN started to recognize the rights of minorities and also in 1992, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) (UNDeclMin) was adopted by the UN (see Eide 2014).

The FCNM initiated the legal category "national minority". Its adoption subsequently gave way to heated debates on what this category entails, and who it actually aims to protect. As Eide (2010; 2014) and Medda-Windischer (2010) point out, the international human rights legislation of today actually builds on fairly vague and undefined definitions of what "a minority" or a "national minority" entails. Not the UNDeclMin nor the FCNM, provide any solid definition on what a national minority or "a minority" means. Therefore, member states of the Council of Europe have made their own judgements thereof. States can "choose" who they recognize as national minorities and who they will apply the FCNM to. Some, for example, use citizenship as a criterion for being regarded a member of a national minority, while others do not (Eide 2014; Medda-Windischer 2010). This definitional vagueness is sustained partly because it allows for a wider range of cases to be acknowledged and included by its scope, but simultaneously it poses a problem. It leaves states with the possibility to simply deny that they have any national minorities on their territories and in this way avoid granting minority members special differentiated rights (Eide 2010). Several scholars have also attempted to offer a definition on "a minority" (see Jackson Preece 1998, p. 14-30). None of them have become internationally established through consensus. A national minority is by most states today, however, regarded as a group that has resided on a state's territory for more than a 100 years (see Hannikainen 1996) and which has a distinct culture and/or language that they wish to protect. The group must also self-identify as a distinct ethnic group.

After the Maastricht Treaty in 1993, the European Union (EU) included the Copenhagen criteria to its accession requirements for new member states. The criteria include respecting human rights and promoting the rights of minorities. At the same, many of the EU countries who were already members in the EU before the criteria were established did not, and do not yet, fulfil the minority protection requirement (see Henrard 2010). France for example has refused to both sign and ratify the Framework Convention for the Protection of National Minorities (FCNM), and for example Belgium, Greece and Iceland have signed it but not ratified it (Council of Europe n.d.). The apparent devotion to minority rights in the EU is therefore something of a "double standard", as Henrard (2010, p. 2) calls it. Still today, EU has no joint minority politics, even though the EU in every single partnership agreement demand the other party to commit itself to these clauses. This has led to a situation, where a wide range of implementations and interpretations of the FCNM exist in EU member states (Agarin & Cordell 2016).

Thus, one can with justice raise the question, whether the Council of Europe in fact can be regarded rather minority un-friendly. Henrard (2010) argues, that the EU has been fairly progressive in its implementation of non-minority-specific policies, but that the implementation of targeted, minority-specific rights is rather lacking still today.

**Indigenous peoples as protected collectivities**

The issues included in Human Rights discourse continued to expand during the post-war era. The discourse is ever expanding and inclusive: new issues and concerns can be addressed in the language of human rights (as Grigolo 2011 discusses on the rights of migrants in Catalonia) and new issues are being framed as *international* human rights law concerns (Scheinin 2003). One of the issues that came to be included in the 1970's was the specific challenges faced by indigenous peoples. In 1982, a UN working group which objective is to deal with indigenous peoples and their problems was established (Gayim 1994, p. 4). After ten years of work, the working group proposed to the Human Rights Council that a separate human rights convention for indigenous peoples should be established. The years 1995–2004 constituted the First International Decade of the World's Indigenous People at the United Nations. The objective of the first Decade was to strengthen international co-operation on human rights issues as well as challenges related to environment, development, education and health that the world's indigenous peoples face (United Nations' Office of the High Commissioner for Human Rights n.d.). From the very beginning of this Decade for Indigenous Peoples, it was clear that the voices of persons belonging to indigenous peoples were weak in the UN structures. In year 2002 Kofi Annan, who at the time was the Secretary General of the UN, welcomed the representatives of the indigenous peoples "to the UN family" officially. The new Permanent Forum on Indigenous Issues had been established at the ECOSOC, at a very high place in the UN hierarchy (Toivanen 2013). It did however still take five more years to pass the Declaration on the Rights of Indigenous Peoples (UNDRIP). It was accepted on September 13, 2007 with the votes 143–4. 11 states abstained from voting. The Declaration had been prepared in a strong cooperation with indigenous peoples' representatives. Robert Coulter (2010, p. 1) has evaluated that the right to self-determination in the Declaration is the most relevant step towards protecting indigenous peoples since the states in which many of them reside gained independence after the era of colonization.

The protection of indigenous peoples and the need to reconcile with their demands is primarily justified by the aim to correct history: the majorities in power knows that they owe large parts of their

prosperity to the indigenous peoples. UN Special Rapporteur José Martinez Cobo drafted a report on the discrimination faced by peoples belonging to indigenous peoples in the early 1980's (Cobo 1981). In that report he clarifies the definition in international law. He stresses that indigenous peoples want to stay different to the surrounding communities and is committed in maintaining, developing and transferring its lands, lifestyle and culture to the coming generations. One marker that should make the distinction between indigenous and minority peoples in general is that in addition to the expectation that they have a differing culture and language than the dominant population, they need to show a different economic and social structure that they wish to keep as a community. In addition, indigenous people must have a common will to maintain their specific identity and culture voluntarily. In reality, this is of course difficult because the long lasting colonial policies have changed the structures but indigenous peoples do often wish that their "original" livelihoods could be returned to them. Being an indigenous instead of a minority has meant a stronger emphasis on self-determination, which has been difficult to accept by certain governments.‡

The International Labor Organization (ILO) has been a central party in the development of the rights of indigenous peoples and provides one of the more salient definitions of the category of "indigenous peoples. Already since 1920s, the ILO has paid due attention to the poor working and living conditions of the indigenous peoples in many of its member states (ILO 1995). According to the Indigenous and Tribal Peoples Convention, 1989 (No. 169) applies to:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
>
> 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. (Indigenous and Tribal Peoples Convention, 1989 (No. 169) Art 1)

‡ See for example the interpretation of the Finnish state of self-determination in relation to the Nordic Saami Convention agreement (Ministry of Justice Finland 2009:17–18).

Even though these working definitions have been offered, defining indigenous peoples (see Toivanen 2013) has, in international law, been, if possible, even more difficult than that of "a minority" (see Tully 2000). It is for example important to note that being an indigenous people does not mean that they need to be the first population in a certain area: many indigenous, aboriginal, native peoples have been forcibly moved and states have brought new people into their original living areas. This is however something than often cause confusion in everyday rights debates related to the rights of people with the status of indigenous people.

**What about a migrant, then?**

During the times when new forms of legal protection and targeted rights for national minorities and indigenous people were being drafted in the European Union, the member states who gave in to granting "old" minorities special differentiated rights, tightly guarded their sovereignty to administer domestic policies for their growing immigrant populations (Galbreath & McEvoy 2012). At no point during the 20th century, did it become seriously deliberated in by European states, whether also immigrant groups could be granted special differentiated rights to maintain and foster their cultures and identities in their new home states. Migrant groups have primarily been granted means for effective integration only, such as majority language learning and assistance with entering the labor market.

If possible, the category of "immigrant groups" is even more blurred and complicated than the two prior categories. When implementing the existing legislation on national minority rights, many states have drawn the line between a "new" and an "old" minorities at 100 years of presence on the state's territory (Hannikainen 1996). In reality however, this category comes with a range of definitions both legally, politically and socially. The definitions are often vague and dependent on context. In the national statistics of many EU countries for example, also children of migrants, children who have acquired national citizenship, can still be included in the category "immigrant" (see e.g. Hagelund 2002 on Norway). In European public discourse, "the migrant" is often portrayed as a "non-western", low-skilled, and culturally divergent person. In media, the term is often equated with "refugee" or asylum seeker (Horsti 2013). An intra-European migrant who has moved to a country as an expert is on often labelled "ex-pat", not "migrant". For example the first immigrants to

UK did not consider themselves migrants: they were not foreigners but people who arrived to the "mother country" from the Commonwealth area (Modood 2010). The same applies to many people who moved from former colonies to Belgium, Netherlands or France. Research has pointed out that also the Spanish, Italian and Greek labor workers who migrated to Germany in the 1960s, did not really consider their re-location as "migration" (see e.g. Kaelble and Kirsch 2008). As European citizens, they simply signed employment contracts and started working in another country than that of their birth. Later on, it was practical to bring the whole family under one roof, and so their families later followed them as well.

An important reason for developing extensive protection mechanisms for national minorities and indigenous groups but not for migrants was the tacit but widely accepted assumption that national minorities should be compensated for history's wrong-doing, while members of migrant diasporas would, over time, either assimilate into their new home cultures or return to their former homelands (see Kymlicka 2001). The historical inequality experiences of earlier generations form one important marker of both national minorities and indigenous peoples: they are people who states tried to eradicate either physically such as the Jews and Roma in the Second World War, or culturally such as the Basques in France and Spain until the early 1980s (see Kymlicka 2001, p. 120-122). Another primary arguments against targeted minority rights for immigrants is, that they have *chosen* to move away from "their own" country (Verkuyten 2005). However, today we have millions of peoples in Europe who did not voluntarily move to there but who had to flee for their own safety. The boundary between "free choice" and "forced migration", is naturally not easy to pinpoint.

Already in 1994, the Human Rights Committee issued the General Comment No. 23 on Article 27 on the Rights of Minorities. In Paragraph 5.1 and 5.2 the comment clarifies that, in fact, Article 27 should also concern people who are non-citizens of the state in question, and can in fact even be considered to concern visitors in a state. In paragraph 6.2 the Comment furthermore stresses, that in some cases ensuring the rights stated in Article 27, might call for positive measures. The implementation of such measures, however, are always context dependent. So far however, nearly no countries have implemented such rights, nor have any substantial claims for it been made by immigrant groups (Kymlicka 2001, p. 28-31). To be granted the rights of national minorities, groups on the border between being recognized as immigrants or as national minorities, have usually relied on re-negotiation of their history and identity to suit the requirements of being recognized as a national

minority in order to gain rights, as for example the minority Kven in Norway has managed to do (Anttonen 1998; Niemi 2002).

All in all, however, we can say, that the international community has moved towards the understanding that autochthonous minorities, be that national or indigenous, have to be acknowledged and given special rights in order for their human rights to be fulfilled. It is today acknowledged, even by many liberals (see Kymlicka 2001; 2007), that dismissing or weakening their special differentiated rights often leads to internal and international conflicts and inequality. The contemporary ruling ideology is that national and indigenous minorities should continue to exist in the future, keeping their languages, cultures and religions alive, and that this can be done only by the support of the states.

Then, when we today live in a world where an increasing amount of the people residing in states were born outside it, can we still justify not granting immigrant groups any form of targeted minority protection? How come immigrant groups are still so consistently excluded from the sphere of particularized minority rights? The question has been raised (see Eide 2014; Medda-Windischer 2010), but has not yet led to any serious policy changes. Another form of border cases that have challenged the existing categorizations of minorities are old minority groups with roots to another nation from which now "new" migrants emigrate. A crucial issue to solve, then, becomes whether one can justifiably separate the rights enjoyed by the "new" and the "old" minority members, and if it can be done, where the line should be drawn.

**Different scholarly peer-groups for each category: a problem**

It is thus clear, that legally today, people with different minority backgrounds who live widely diverse lives that are difficult to categorise, are in law divided along a typology that has arisen from highly value-loaded, historical and political context. Legal categories, are always either or and never attentive to the nuances of human difference (see Brubaker 2004). It is clear then, that these categorizations; indigenous people, national minority and immigrant groups, do not fit seamlessly with the vast experiences and challenges that minority members face in the modern and ever more mobile world.

But it is not only legally, that these groups have been treated as naturally given entities. The vast body of existing academic literature and research on migrant minorities, national minorities and indigenous peoples, not only treats the categories as separate as well, but also focuses on different aspects. They apply different research approaches and methodologies to each category. The academic

literature on national minorities is very policy-oriented and usually focuses on issues of linguistic, educational and cultural rights, political participation and identity (see e.g. Brubaker 1995; Jackson-Preece 2005). Conversely, the academic literature on migrant minorities and migration tends to focus more on transnationalism, remittances, access to services and the labor market, legal status, naturalization, identity, integration and assimilation, etc. (see e.g. Favell and Hansen 2002). Indigenous research on the other hand has had a strong focus on rights, policies, revitalization and identity on the one hand, and their cultural peculiarities such as myths, cosmologies and nature relations on the other hand (e.g. Virtanen 2016 on cosmologies, Niezen 2003 on politics, Saul 2016 on international law). In the specific case of the Roma, there is a growing body of anthropological research, complemented by analysis of policies on specific issues such as political participation, housing, education, health, employment, and non-discrimination (see e.g. Stewart 1997; Barany 2002, Hajjoff & McKee 2000, Nordberg 2015).

The academic research has thus so far approached the study of national minorities, indigenous peoples and migrants separately and in disciplines that often do not connect (Medda-Windischer 2010). For example, when attending larger academic conferences and panels related to ethnic minority groups and issues they face for example, one can detect that even the papers dealing with national minorities, migrants and indigenous peoples are presented in different panels. I argue, that it is definitely worthwhile to look, at least sometimes, at the similarities of the situations faced by different minorities (Laakso et al. 2016, Medda-Windischer 2010).

Also the wide headline of "multiculturalism" or "minority policies" has both in scholarly and regional public discourses also in few cases included all minority members. As Kymlicka (2007, p. 17, 77-79) mentions, "multiculturalism" in Latin America, for example, mostly refers to indigenous peoples claims and excludes immigrant minorities, and in New Zeeland and Canada, the opposite is the case. Also Lepola (2000) shows, that in the Finnish national discourse, multiculturalism only became a matter of debate when new minorities started to arrive and it never truly included old minorities and their claims. This has also interestingly enough been the case in the multiculturalism debate in Europe at large, which never covered indigenous peoples and their rights and grievances, according to Kymlicka (2007, p. 17, 77-79).

Research has tended to address ethnic minorities rather often as a problem which European societies have to deal with. I remember a German sociologist whose main bulk of research was to study at what age children can immigrate at the latest to countries such as Germany, and still manage

to acquire the qualifications required for studies at the university before reaching that age. This is unfortunately a fairly common approach in research on immigrants; reasons for problems are in focus and not possible solutions to improve the minority members' life standards. Thus, the academic community has not either so far made any serious attempts for including immigrant minorities into the legal and political scholarship that aims on finding minority rights solutions for the issues minorities face.

Thus, three minority categories have become "natural" entities: national minorities, ethnic minorities, aka migrants, and indigenous peoples. For example, even though Eide (2010) fruitfully questions the current legal norms according which "old" autochthonous minorities are the most eligible for more targeted minority rights, he still does not to discuss the distinction between national minorities and indigenous peoples today, and how these legal divisions relate to the actual situations of minority members. Still it seems, that including "all minorities" in one study, seems almost unthinkable. But why is that? What are the reasons for treating the experiences and needs of these group as profoundly different?

For example, Kymlicka (2007, p. 8) argues, that the problematics with the current minority rights system is not necessarily a case of particularism versus universalism, but rather a problem of the implementations of this hierarchical category system. I see that we have here rather much work to do in order to capture the whole "social life" of different human rights and minority relevant treaties, but also to understand their specific ways of creating social reality.

In my research I have shown how the category of national minority and indigenous peoples not only have an emancipative effect on people defined as such but also forces them to accept certain constraining effects, a need to "perform identity" rather than just being what they are and living out what it means to be them in the modern world (see Toivanen 2015, 2016). As I have argued elsewhere (see Toivanen 2004, 2013) both the category of indigenous peoples and the category of national minorities have led to a situation, where the current legal and common norms require minorities to portray their identities according the criteria for being an "authentic" minority entitled to special differentiated rights. Internal unity and homogeneity, a unified identity, a culture and language distinct from the majority groups, traditionalism, cultural continuity and a history of oppression by the state are some of the common criteria to which minorities try to live up to, in order to get their rights claims heard. Since these criteria require homogeneity and unity of national minorities and indigenous groups, this has many times led to *internal* minority groups being silenced and having

less possibilities to get their voices heard (see Toivanen 2016 on the case of internal Sámi minorities). I argue that this is a serious issue that needs to be addressed. Another smallish caveats in the indigenous peoples' protection, is that they are expected to continue living as a traditional group and sticking to their ancestral social structure. This is in reality a very hard job: For example, in Finland over 70% of Sámi children are born outside the homeland area (Länsman 2008).

For example, an individual's belonging to these categories or ethnic groups, can change several times during one person's life: an indigenous Sámi who moves to Austria becomes a migrant, a Hungarian migrant who moves to Austria may become a member of a national minority, and a Hungarian national minority member who moves to Norway and marries a Sámi may become de-facto indigenous. At the same time, we know from socio-legal research that the categories create subjectivities and feelings of being (see Brubaker 2004). This means that the legal category of indigenous peoples began a life of its own in terms of indigeneity-ness when for example indigenous peoples around the world started thinking of themselves in terms of sameness: stressing the similarities in the past and demanding corrections of similar kinds, even though historians would argue that for example the colonialization periods of Sámi in Fenno-Scandinavia or Inuit in Canada have very little resemblances with the colonialization of peoples in Brazil or Mexico.

Similarly, a person belonging to a national minority, does not live her life as such. As the famous Sorbian writer Jurij Koch (1996, conversation during my research on the Sorbian minority pers.comm., 5 October) once said to me; he does not wake up in the morning as a representative of Sorbian national minority but as a human being. The minority-ness is created in relation to others, in for example such moments in which others can easily use their first language but you cannot, because yours is a minority language.

Similarly, Benhabib (2002) for example, has criticized current cultural minority rights and legal scholars looking into the issues, for still not being attentive to the current advances in social studies regarding cultural and ethnic identities. Scholars in the two academic fields seldom manage to adequately make use of each other's theoretical advances (Stones 2006). As we today know, the belief in culture and ethnic groups as bounded units dividing society into clearly defined, homogenous units profoundly different from each other, is a mere lay ideology and social construct (Malkki 1997, Gupta & Ferguson 1992). Culture *is* indeed in essence a group feature (see Francioni 2008: 11), but the boundaries and internal hybridities and differences are never as clear-cut as legal, political or everyday discourse make them out to be. It does not comply with the mess, hybridity and continuous

change that constitutes real social lives today. To base current minority rights frameworks on this now outdated view of ethnic and cultural group identities, can thus lead to serious issues when they are implemented onto populations where many individuals do not fit into these simplified categorizations. In the case of Roma, both the situation of the "category" of Roma as such, and the individuals it can be argued to entail, is, as will be illustrated, a prime case of a group that has "fallen in-between" the categories. Roma does not fit the current typology on which the minority protection rests, which, I argue, is part of why they still today are the most excluded and marginalized groups in Europe today.

Finally however, I think one more issue of unquestioned imaginaries still needs to be addressed. The whole idea of "different minorities" and how they should be categorized in order for us to ensure their rights, rest on the idea that there is a "majority", the majority people of the nation, who has the most right to enjoy the protection and privileges ensured by the state. It goes unquestioned, that in fact the majority has all their cultural rights fulfilled, since it is inscribed in all the state's institutions and structures, however ethnically neutral one claims them to be. Nothing is "culture-less". We have created the illusion that the people belonging to the majority have the power to decide what rights others should or should not enjoy. As I will show, this especially, has created problems for Roma when they try to get their voices heard and their human rights fulfilled.

**The case of the Roma: Falling in-between categories**

From the perspective of these political and historical contexts that gave way to the contemporary typology of minorities as the basis for rights, it becomes clear that they are born from far from value-free political strivings. Furthermore, they are far from being attentive to the actual needs of minority members and different groups. To illustrate how the current typology has led to mis-recognitions of both minority groups and members as well as their actual needs, I have chosen to bring forth the case of Roma. The Roma are a *category* of people who live in a minority situation in a majority of the European countries today. A majority of the people who can be included under this heading of "Roma", face serious discrimination and exclusion today, and are in desperate need to get their human rights fulfilled (Sigona & Vermeersch 2012).

The often used signifier 'Roma and travelers' already indicates that we seldom really know who we are talking about. Roma is not a united ethnic group, even though some activists have strived to make them one (Agarin & Cordell 2016, p. 116; Csepeli & Simon 2007; McGarry 2004). A wide

range of myths about Roma history and origin exists both among scholars and in public and everyday narratives (Blomster et al. 2014, McGarry 2010, p. 7-8). Roma are "extremely diverse" and not homogenous along almost any trait; they have different languages, religions, livelihoods, countries of birth, tribal affiliations and so forth (Barany 2002, p. 12). Some public constructions and legal application of the umbrella term "Roma", have relied solely on their joint experiences of social and economic exclusion and marginalization (Csepeli & Simon 2007).

The diversity of Roma and the lack of many unifying symbols or lifestyles, have made it difficult for Roma to live up to the requirements for portraying themselves as "authentic" minorities, which, as mentioned, is required today to be eligible for national minority or indigenous peoples rights. It has been pointed out that Roma peoples have not been able to make shared "Roma rights claims" as a united ethnic group. Thus, the Roma rights -movements give wrong assumptions of there being one single kind of Roma (McGarry 2014). Roma activists and also academics, have tried to construct a shared Roma identity, in order to make stronger right claims (Agarin & Cordell 2016, p. 116). Tremlett (2014) argues that also many scholars still treat Roma as one group, and that this should be reconsidered. One should instead ask, who wants to make Roma into one group, and why? McGarry (2014) and Csepeli & Simon (2007) argue, that most construction of Roma identity today are imposed and seldom in the public sphere have Romani individuals and groups themselves had the possibility to participate in the construction and negotiation thereof. As with migrant studies, McGarry (2010, p. 60) further points out, that the rights literature on Roma tend to focus on minority "problems" and not on the active interest and agency of them as rights subjects.

According to many initiatives, projects and programs addressing the rights of Roma peoples, the Roma do not only need support in maintaining their culture, languages and lifestyles – as all national minorities – but (sometimes even on the contrary) they are supposed to experience empowerment and social mobility. Romani inclusion measures have been taking a shift towards becoming stronger in the 2000's (Agarin & Cordell 2016, p. 110-112). One of these initiatives was called the Roma Decade. In 2005, twelve European countries launched the Decade of Roma Inclusion which objective was join efforts to achieve better standards of living and political and social inclusion of Roma (Decade of Roma Inclusion 2005-2015 n.d.). It did, however, not treat Roma as a distinct ethnic group, but rather as individuals with socio-economic hardships and obstacles for participating in political sphere. Some member-states such as Bulgaria, the Czech Republic, Hungary, Romania and Slovakia outlined Roma-specific policies with group approach and targeted measures (Ibid.).

In their evaluation of the Decade for Roma and Travellers, Rorke, Matache & Friedman (2015) in their book *A lost Decade? Reflections on Roma Inclusion 2005-2015*, persuasively show, how most of the money and effort put into it went wasted. Roma were kept as marginal as ever. The Decade did not bring about equality as was imagined. Of course, certain organizations and peoples profited of it but all in all, the impact of the new empowering policies was to say the least meager. One analysis on why Roma do not profit from the measures tailor-made for helping them, is that such kind of Roma peoples as these programs imagine them to be may not exist in reality. Many are economically disadvantaged and are primarily in the need for protection from racism and exclusion. However, they simultaneously also need support to achieve a positive cultural identity, language and to maintain their culture.

As shown above, minority rights today are primarily granted and implemented by individual states, and the groups granted special differentiated rights are primarily those who can demonstrate old ties to the lands on the territory of the state. In this way, a group becomes eligible for rights and included by the nation and eligible for its protection. A large proportion of Roma do not ascribe their group identities to any specific territories in Europe, nor do many know where their ancestors were from. They are in many ways without "home-territory" (Barany 2012, p. 2, 9-10). Roma are thus transnational, non-territorially based peoples and at the same time they are persons with home countries and citizenships. This is part of the main issue that Roma have faced when trying to fit their claim into the current minority right frameworks. In 2005, the European Parliament issued the 'Resolution on the Situation of Roma in the European Union', which defined Roma as a 'pan-European community' and a pan-European minority group. Agarin & Cordell (2016, p. 110-112) however argue, that the increase in focus on Roma issues in European institutions, had a surprising, primarily negative consequence for the Roma populations. Now that European institutions fostered joint approach to Roma issues and constructed them as a "pan-European" problem, they managed to detach them from any nation state. Thus, this weakened their possibility to claim status as national minorities, which after all, is of the stronger conventions for targeted positive minority rights measures in Europe today. The FCNM is as mentioned established on a vision of territorial rights; it is not really good with non-territorial minorities such as Roma or migrants (see Medda-Windischer 2010). I argue that this is part of the convention's failure.

Later, the institutions of Europe changed their approach, and started to return the responsibility for Roma inclusion onto member states. Now the EU was meant only to support the

member states in their measure against Roma exclusion. The current approach in EU on Roma is, that since each member state have their own specific relation to its Roma minority and different domestic policies and institutions offer different possibilities and obstacles for the Roma, each member state should form their own minority policy (European Commission 2012).

However, leaving the responsibility to the individual member states led to Roma achieving very different "position as claimants" in different states and localities (Nordberg 2015, p. 94). Roma have gained some level of legal recognition in 21 EU member states, some recognize them as a national minority (e.g. Finland, Austria, Greece, Latvia, Slovakia) and some as an ethnic minority (e.g. Hungary, Netherlands, Poland) (Agarin & Cordell 2016, p. 118). Czech Republic refers to them as both. Slovenia on the other hand labels them as "Romani community", and applies sets of rights from both ethnic and national minority frameworks. In Norway, some Roma even experienced that assigning Roma the status of national minority was "a form of forced categorization and a disciplinary measure which could reinforce social differentiation" (Halvorsen 2004, p. 56, cited in Nordberg 2015, p. 105). In France and the United Kingdom (UK) Roma are categorized by lifestyle, not ethnicity; as travelers and nomads. This thus excludes focus on Romani individuals who do not live according to a nomad lifestyle. This is yet another requirement imposed by the current minority right frameworks; that minority members should demonstrate cultural continuity and the devotion to traditions and past lifestyles and cultural traits. As is the case with many (or, one could argue, all) other minority groups, many individuals live "on the border" between minority and majority, living out the culture and identity of both in intermixed and different ways (see Stenroos 2014 on Roma youth in Finland). From this position, it becomes harder to portray an identity that is found "authentic" and is listened to when entering minority rights debates.

Another issue that the Roma have faced, is that many Roma individuals have moved beyond the borders of the country in which they have citizenship, and thus they reside in states of which they are not citizens. As mentioned, this many times excludes individuals and groups from being granted minority rights, even though the Human Rights Committee (1994) as mentioned issued the General Comment No. 23 on Article 27 on the Rights of Minorities, which stated that also visitors and non-citizens should be granted rights. Also on this issue, member states in the EU have taken different approaches. UK and Ireland for example, grant Roma minority rights regardless of their citizenship whereas Finland doesn't.

These aspects of diverging interpretations of Roma minority categorization underline the power that individual states today have when deciding how to treat their minority populations as well as their inattentiveness to the actual needs and voices of Roma. It goes against the core ideas of human rights, that states once again can choose, how people on their territories should be treated.

What about the category of indigenous peoples, then? Roma do not fulfil the criteria of having a homeland which has been colonized, making it difficult to see how they could claim this status. I argue, however, that in many ways, they are in need of similar rights and protection as many indigenous peoples today. As above mentioned, one reason and one requirement for indigenous rights is, that they have kept or wish to revitalize their societal structures that differ from the minority society. This is also something that the Roma certainly in many aspects have done and are doing today. Many Roma peoples and communities live according to their own societal structures and traditions today (Toivanen 2015). They have codes of conducts and social relationships among them that are quite distinct from many of the majority societies in Europe. Coupled with the experiences of exclusion and harsh discrimination, they have guarded these traditions tightly. I argue, that the strict division into "indigenous peoples rights" vis-à-vis the rights of other categories, have made us unable to imagine or bring forth, that the Roma communities could actually benefit greatly would also their distinctive societal structures be seen as something protectable, and not as simply an obstacle to inclusion. Finding it valuable and something to protect, could be one of the ways to lessen the current level of prejudice and discrimination that Roma face.

A final trait related to identity narrative and history which is strongly related to being granted minority or indigenous rights today, is the recognition of past grievances and wrongdoings by states that the minority members have faced. In the case of Roma, one can argue that their past has in many contexts been silence and not included properly in the current debates regarding the EU states responsibility to make up for former wrong-doings. We are all familiar with the horrid wrongdoings towards the Jews during the Second World War. However, what is less known and emphasized, is that also 250 000-1.5 million Roma were murdered under Nazi regime (McGarry 2010, p. 20). McGarry (Ibid.) argues, that Roma were also the object of genocide during the Second World War and that it was not their social status but rather their ethnic identity that made them a target, just like the Jews. During the Nuremberg Trials, however, Roma got nearly no attention. McGarry (Ibid.) argues, that if this would be widely acknowledged, Roma would have perhaps got a different minority protection than they now have.

One of the Council of Europe's efforts to empower Roma peoples was to found an institution named the European Roma and Travellers Forum (ERTF). In this institution, they wanted one Roma organization to present the Roma from each member state of the Council of Europe. This created a lot of confusion because the Roma people did not have one umbrella or leading organization in each member state. So, it had to be decided, who would be elected to this forum and how. For example, in Finland, a National Forum was established but all the biggest Romani organizations did not become members of it (Toivanen 2015). Thus, even though the Council of Europe wants to listen to European Forum for Roma and Travellers, the one's presenting the Forum are rather arbitrarily selected. In June 2017, a new institution called The European Roma Institute for Arts and Culture e.V. (ERIAC) was inaugurated in Berlin as a joint initiative of the Council of Europe, the Open Society Foundations, and the Roma Leaders' initiative – the Alliance for the European Roma Institute. The ambition is to increase the self-esteem of Roma and to decrease negative prejudice of the majority population towards the Roma by means of arts, culture, history, and media. It remains to be seen how this organization manage to allow for diversity among Roma.

The current policies at place are not really addressing the mechanisms of exclusion in a more historical perspective (see e.g. the enlightening work of Pulma [2014] on Roma history in the Finnish context). Anti-Gypsyism is part of orientalist discourse and it seems to be one the most difficult discourses to overcome in the present-day discussion on what constitutes the Roma minority (see Csepeli & Simon 2007; McGarry 2010; Toivanen 2013). The situation of Roma is more complex than the current minority categories allows them to be, and for sure they are not the only minority which face problems to fit their history, identity and current realities into the narrow criteria posed by current minority rights frameworks and discourses. One may also argue that Roma have been left in a limbo where many states situate them to the larger region of Europe, make them a "pan-European" problem, while the European institutions conversely puts the responsibility back on the individual states. The reason for this is, that minority rights categorization today is based on strong values of autochthony and territoriality; on the requirement of a homeland. And since minority rights are implemented primarily by the nation states and since the majority, consciously or not, is seen to have the most right to the public sphere of that state, groups in minority position have to either argue for inclusion and recognition as "a people" of the state, or be left excluded as not belonging and hence not entitled to special protection by it.

**Conclusion: Reaching for solutions**

At the core of the conclusions of this overview is, that one could argue that we actually should revise our ways of thinking about the nation state. This has been called for by numerous scholars (see Dahinden [2016]; Favell [2008]; Wimmer & Glick Schiller [2002] and on the concept of methodological nationalism). However, once again as we see, that the advances in the social sciences are not made use of when new legal frameworks and policies for the protection of minorities are being drafted. As long as we are stuck in nation state paradigm, imagining that they are all the same, and that joint categories for minority protection could work for all, we are not really moving forwards in recognizing minorities and taking their rights claims seriously. The ethnically clean nation state never existed but was made by force (see Michael Mann's [2004] examples), so with good ethical reasons one may ask, how can one use it as the paradigm still today when discussing who is a minority?

So, should we stop categorizing these very heterogeneous and fluctuating people, of which the Roma are one prime example, with the legal terms of 'migrant', "national minority" and "indigenous people" and instead have needs based more tailored ways of accommodating rights? We talk about recognition of minorities but we do not recognize all the diversities and different human situations and destinies. Why do we protect only certain minorities, and is there, coupled with methodological nationalism, a certain form of primordialism at work here? Do we like to see people in certain boxes? Using primordialist categories of ancient culture and joint past, minority rights are rather instrumentalist. When the subordinated and marginalized are tied to a common destiny or future that is, if scrutinized in essence actually defined by those who have power, can we call this process emancipation?

One the one hand one could say, that indigenous peoples, national minorities and migrants want very similar things: social equality, cultural maintenance and acceptance of identity. But then again, we could also say, that they want totally different things. Indigenous peoples want land ownership or at least control over their livelihoods. National minorities want strong representation in decision-making and full acceptance of existence (inclusive language and religious rights and exemptions). Migrants want equal treatment, equal opportunities and anti-discrimination.

Dismissing the minority rights categories then, would basically require needs assessment: what do people who belong to minorities actually need in order to have a dignified and equal life? One way to go is to continue shifting from "minority problems" to minority rights responses, case by case (as proposed by Roberta Medda-Windischer, Franscesco Palermo and Rainer Hofmann at the

workshop *What's in the name*, in April 2017 that is the basis for this book) and to foster interpretations of the current frameworks that are more context sensitive (see Eide 2014).

The fact is that the international community has already worked for over 50 years on anti-discrimination, policies of multiculturalism, accommodation of difference, minority rights and a range of different conventions, laws and directives which support these ideas. We already have a range of tools that we can start with. For example, the UN gives the working definition on minorities:

> "The established practice of human rights mechanisms and bodies has been to recognize groups with a distinct culture, religion or language, which are in a non-dominant position economically, socially and/or politically, and which wish to maintain their distinct identity and identify themselves as a minority (self-identification). As well, persons belonging to minorities need not be citizens of the State in which they live." (United Nation's Commission on Human Rights 2006, p. 2.)

Could this definition do for all persons of all these three legal categories? One could also think of taking the existing Framework Convention on National Minorities and start applying it to all minorities. This would entail the continuation of the article by article approach – already the working method of the advisory committee of the FCNM – and look at all peoples through the lenses of this convention. This would not be anything extraordinary: already now for example the Advisory Committee on the Framework Convention for the Protection of National Minorities monitors the rights of indigenous Sámi peoples in Norway, Sweden and Finland. Also in Finland, for example, the Advisory Committee has stated, that even though Finland only recognizes the Russians who were in Finland when Finland gained independence, the needs and claims of all Russian speakers are very much similar and that separating between the so-called old Russian and new-Russian minority could be revisited. In Germany, furthermore, the government hasn't recognized the existence of a Turkish minority. However, the Advisory Committee decided to comment upon the realization of rights of all persons with a Turkish background in Germany. Another groundbreaking development was when Czech Republic in 2013 recognized a migrant community as a national minority, as the first state in Europe; namely the Vietnamese (Government of the Czech Republic 2018).

But, then again, the FCNM was drafted with the idea derived from the League of Nations era with the motivation to compensate for the wrongdoings of the past, whereas it was also a quick effort of remedy to the ethnic cleansing that had taken place in Europe, in Former Yugoslavia. By ratifying the convention, governments in Europe have recognized that in the past, certain groups of people existed and were subjected to discrimination and forceful assimilation policies and not acknowledging and regulating their rights to culture and co-existence might endanger peace on the

European continent. Now, widening the scope to cover people who do not have the same historical experience, might dilute the central message of the protection of national minorities. Another question is of course, would it even help migrant populations?

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